

No. 14041

**United States
Court of Appeals
for the Ninth Circuit**

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court,
for the District of Montana,

WELLINGTON D. RANKIN,
ARTHUR P. ACHER
Attorneys for Appellant



No. 14041

United States
Court of Appeals
for the Ninth Circuit

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

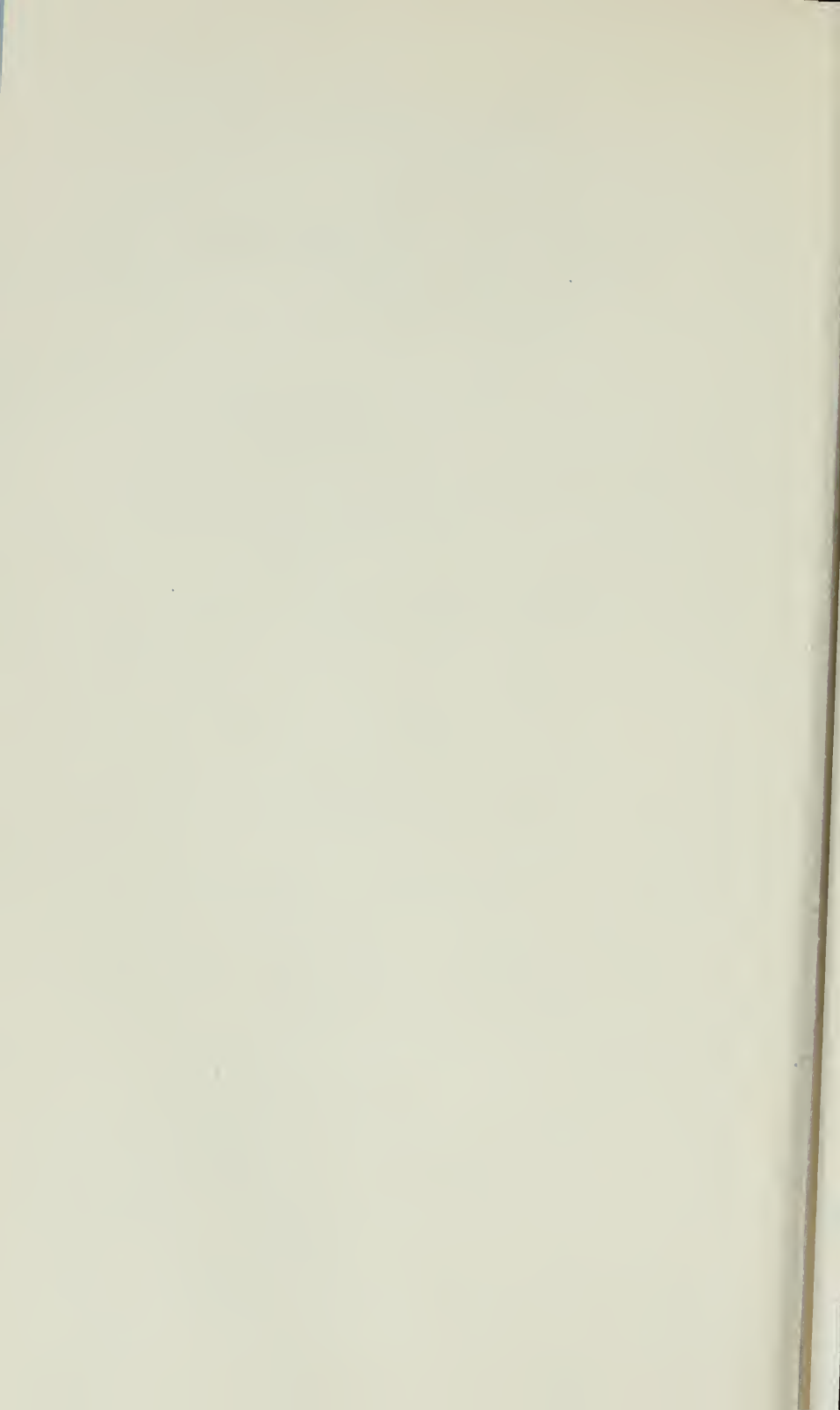
Appellee.

BRIEF OF APPELLANT

Appeals from the United States District Court,
for the District of Montana,

WELLINGTON D. RANKIN,
ARTHUR P. ACHER
Attorneys for Appellant





INDEX

	Pages
JURISDICTIONAL STATEMENT	3
STATEMENT OF THE CASE	5
SPECIFICATIONS OF ERROR	6
ARGUMENT	7
Plaintiff would have a remedy under Montana law	7
Plaintiff not dependent cannot recover under the FECA	8
Federal Employees' Compensation Act	9
The plaintiff and appellant having no remedy under the Federal Employees' Compensation Act should not be denied relief	11

TABLE OF CASES

	Pages
Archer v. United States (D. C. Cal.) 112 F. Supp. 651..	11
Cannon v. United States (D. C. Cal.) 111 F. Supp. 162, 167	12
Dishman v. United States (D. C. Md.) 93 F. Supp. 567	12
Ettor v. Tacoma, 228 U. S. 148; 57 L. Ed. 773, 778.....	10
Gibbs v. United States (D. C. Cal.) 94 F. Supp. 586.....	14
Gibbs v. United States (CCA 9), 200 F. (2d) 197	14
Gilman v. The G. W. Dart Hardware Co., 42 Mont. 96, 99, 111 Pac. 550	7
Hitaffer v. Argonne Co. 87 App. D. C. 57, 183 F. (2d) 811, 23 A. L. R. (2d) 1366	12-15
Inland Waterways Corp. v. Doyle (CCA 8) 204 F. (2d) 874	11
Johansen v. United States, 343 U. S. 427, 96 L. Ed. 1051	11
Koshkonong v. Burton, 104 U. S. 668, 26 L. Ed. 886, 890	10
U. S. ex rel Atty. Gen. v. Delaware & H. Co., 213 U. S. 336, 408, 53 L. Ed. 836, 849	10

STATUTES CITED

Pages

United States Code :

Section 757, Title 5	5-6
Section 760, Title 5	8
Section 2674, Title 28	4-6-7
Section 1346, Title 28	4
Section 1291, Title 28	3
Section 1294, Title 24	3

Revised Codes of Montana, 1947 :

Section 93-2809	7
Section 93-2810	7
Section 93-2824	14

C
a
S
a
a
pl
A

**In The
United States
Circuit Court of Appeals
for the Ninth Circuit**

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States
for the District of Montana.

JURISDICTIONAL STATEMENT

This court has jurisdiction under the provisions of Section 1291, Title 28, U. S. Code, providing that the courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, and Section 1294, Title 28, U. S. Code directing appeals to be taken from a district court to the court of appeals for the circuit embracing the district.

The plaintiff and appellant, Henry Thol, by the complaint seeks damages under the Federal Tort Claims Act on account of the death of plaintiff's minor son,

Henry Thol, Jr. who died as a result of personal injuries sustained on August 5, 1949, in a forest fire.

Under Section 2674, Title 28, U. S. Code¹ it is provided that the United States shall be liable in tort claims "in the same manner and to the same extent as a private individual."

The district court had jurisdiction by virtue of the provisions of Section 1346, Title 28, U. S. Code,² under which the District Courts have exclusive jurisdiction of civil actions against the United States for damages for death caused by the negligent or wrongful acts or omissions of any employee of the government while acting within the scope of his employment under circumstances wherein the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

1. Appendix I.

2. Appendix I.

STATEMENT OF THE CASE

The complaint charges that Henry Thol, Jr., minor son of the plaintiff, and a group of fourteen others, called smoke jumpers, required to descend by parachute from the air to suppress forest fires, were dispatched by officials of the U. S. Forest Service on August 5, 1949, to the site of a fire in the Helena National Forest near Helena, Lewis and Clark County, Montana (Tr. 1-15).

It is alleged that the United States, by and through its Forest Service officials, was negligent in dispatching the smoke jumpers under the existing conditions (Tr. 7); that the defendant failed to supply them with adequate equipment (Tr. 8); that the foreman in charge of the group was guilty of negligence, and that as a result of the negligence Henry Thol, Jr. was trapped by the fire and burned to death, (Tr. 14) the conflagration having trapped and caused the death of thirteen of the young men.³ It is further alleged that the plaintiff, by reason of the death of his minor son, suffered the loss of the comfort, society, and companionship of his son, and contributions towards his support (Tr. 15).

The district court held that under the provisions of Section 757 (b), Title 5, U. S. Code⁴ the exclusive remedy of the plaintiff was that provided by Chapter 15, Title 5, U.S.C.A., the Federal Employees Compensation Act, and the action was ordered dismissed upon the defendant's motion that the complaint failed to state a claim upon which relief can be granted.

3. Life Magazine August 22, 1949.

4. Appendix III.

SPECIFICATIONS OF ERROR

The United States District Court erred:

1. In granting the defendant's motion to dismiss;
2. In holding that the complaint on file herein fails to state a claim upon which relief can be granted;
3. In finding, holding and deciding that under the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.,
4. In not finding, holding and deciding that the complaint states sufficient facts to authorize recovery by the plaintiff against the United States under the Federal Tort Claims Act, Section 2674, Title 28, U.S.C.A.

ARGUMENT

The statement of points filed in the district court agreeable to Rule 75, Federal Rules of Procedure, and the Statement of Points filed in this court are identical with the Specifications of Error above set forth, and all present the single proposition that the district court erred in holding that the Federal Employees' Compensation Act is an exclusive remedy.

Plaintiff Would Have a Remedy Under Montana Law

Title 28, U.S.C.A., Section 2674, declares that the United States shall be liable for death caused by the negligent acts of a government employee under circumstances wherein the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁵

Section 93-2809, R.C.M. 1947, provides that a father may maintain an action for the death of a minor child.⁶

Section 93-2810, R.C.M. 1947, authorizes recovery by the heirs for the death of one not a minor.⁷

In construing these provisions in *Gilman v. The G. W. Dart Hardware Co.*, 42 Mont. 96, 99, 111 Pac. 550, the court said:

“It will be noted that section 6485 relates to the injury or death of a minor child, while section 6486 refers to the death of a person not a minor, and the latter section expressly provides that in both cases such damages may be given as under all the circum-

5. Appendix I.

6. Appendix VI.

7. Appendix VI.

stances of the case may be just. *There is no limitation upon the amount to be recovered in either case, except that it shall be a just award under the circumstances.* It is true that the right of a father to the earnings of his child is limited to the period prior to majority, but it does not necessarily follow that the pecuniary loss sustained in the death of a child is limited to what the child will earn before he becomes on age. On the contrary, the circumstances may be such as to indicate that such loss will be much greater.”

Accordingly, the plaintiff in this action would have a claim for the death of his minor son under the laws of the State of Montana.

Plaintiff Not Dependent Cannot Recover Under the FECA

However, under the Federal Employees’ Compensation Act, Title 5, U.S.C.A., Section 760,⁸ as the statute existed at the time of the death, provided that compensation was payable to a parent “wholly dependent for support upon the deceased employee,” and payments of compensation were to be terminated when said parent “ceases to be dependent.”

The plaintiff in this action could not qualify as a dependent under the Federal Employees’ Compensation Act. Under workmen’s compensation acts generally, actual dependency is a prerequisite to the receipt of compensation. (100 A.L.R. 1090).

If the Compensation Act is held to be exclusive, the plaintiff is without a remedy, although under the laws of Montana a private individual would have been respon-

8. Appendix V.

sible to him in damages, and the court or jury in assessing damages could have considered loss of society and companionship, and amounts which the son may have contributed to his parent. if he had not been killed, although he was not legally obliged to make them.

FEDERAL EMPLOYEE'S COMPENSATION ACT

The Federal Employees' Compensation Act as enacted September 7, 1916⁹ did not purport to provide an exclusive remedy.

The Act was amended July 1, 1944 (5 U.S.C.A. 757), to provide that one entitled to receive benefits under the Compensation Act and also under 'any other Act of Congress', 'shall elect which benefits he shall receive.'¹⁰

The plaintiff's son was killed August 5, 1949, (Tr. 14).

The Act was amended October 14, 1949, over two months later by adding a new subsection (b) providing¹¹

"The liability of the United States * * with respect to the * * death of an employee shall be exclusive, and in place, of all other liability of the United States * * to his legal representative, spouse, dependents, next of kin, and anyone else otherwise entitled to recover damages from the United States * * on account of such * * death."

The Act purports to provide that the amendment of October 14, 1949 be retroactive and "shall apply to any

9. Appendix II.

10. Appendix II.

11. Appendix III.

case of injury or death occurring prior to the date of enactment of this act.”¹²

The court said in *Ettor v. Tacoma* 228 U.S. 148; 57 L. Ed. 773, 778:

“The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.”

In *Koshkonong v. Burton* 104 U.S. 668, 26 L. Ed. 886, 890, it is stated:

“In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law.”

In *United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U.S. 366, 408, 53 L. ed. 836, 849, it was said:

“Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter.”

**THE PLAINTIFF AND APPELLANT HAVING NO REMEDY
UNDER THE FEDERAL EMPLOYEES' COMPENSATION
ACT SHOULD NOT BE DENIED RELIEF**

In *Johansen v. United States* 343 U. S. 427, 96 L. Ed. 1051 the Supreme Court in a five to four decision, held that even prior to the October 14, 1949 amendment, the Federal Employees' Compensation Act was an exclusive remedy, precluding recovery, by or on behalf of seamen of a "public vessel" under the Public Vessels Act.

However in *Inland Waterways Corp. v. Doyle* (CCA 8) 204 F. (2d) 874, the Eight Circuit held that notwithstanding the decision in *Johansen v. United States*, a seaman on a "merchant vessel" injured prior to the amendment to the Federal Employees' Compensation Act, and who could be held to be an employee of the United States, could nevertheless recover in an action filed in 1951 under the Suits in Admiralty Act, (46 U.S. C.A. Sec. 741 et seq). The latter act permits suits of seamen on vessels operated by the United States by libel in personam against the United States, the same as could be brought if the vessel were privately owned.

In *Archer v. United States* (D.C. Cal.) 112 F Supp. 651, it was held the parents of a cadet, killed in a plane crash, could not recover under the Federal Tort Claims Act, since the parents were dependent upon their son, and "under the law the plaintiffs are allowed compensation for the death of their son", citing *Johansen v. United States*, 343 U.S. 427, 96 L Ed 1051.

We contend that the *Johansen* case cannot in any event properly be construed to hold that one who does not

come within the provisions of the Federal Employees' Compensation Act, is nevertheless to be denied relief under the Federal Tort Claims Act.

The principle for which we contend we believe is recognized in *Dishman v. United States* (D.C. Md) 93 F Supp. 567, where it was held that one employed by the United States not injured in the course of his employment and hence not eligible to recover compensation, could recover under the Federal Tort Claims Act for injuries received while being treated in a Veterans hospital.

Likewise, in *Canon v. United States* (D.C. Cal) 111 F Stupp. 162, 167 where a judgment of \$123,904.65 was awarded a civilian medical secretary, an employee of the United States, for damages resulting from improper medical care at an army hospital, the court said:

“The *Johansen* case, however, does not govern here as *Johansen* clearly sustained the injury for which suit was brought while in the performance of his duty. *While the Federal Employees' Compensation Act is the exclusive remedy of those who are injured in the performance of their duty, that Act cannot be held to prevent those individuals not covered by it from pursuing other remedies.* (*Dishman v. United States*, D.C. Md. 93 F. Supp. 567)”

It is submitted that the rule applicable is that recognized in *Hitaffer v. Argonne Co.* 87 App. D.C. 57, 183 F. (2d) 811, 23 A.L.R. (2d) 1366. There the husband having been injured received compensation under the applicable Workmen's Compensation Act for the District of Columbia. The wife brought action for damages for the loss of her husband's consortium.

The court held the wife was not barred by the Compensation Act, notwithstanding its broad terms as follows :

“The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *”

The court said:

“There can be no doubt but that this section is designed to make the employer’s liability under this statute exclusive of any other liability either at law or in admiralty to the injured employee or anyone suing in the employee’s right. But where a third person is suing in his or her own right on account of the breach of some independent duty owed them by the employer, even though the operative facts out of which this independent right and correlative duty arose are the same as those out of which the injured employee recovers under the Act, the Act does not proscribe the third person’s cause of action.”

* * * *

“Moreover it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee’s right on account of employment connected disability or death. It can hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss.”

Any cause of actions which might have arisen to Henry Thol, Jr. in his lifetime, for pain, suffering, loss of earn-

ing power, could have been prosecuted after his death by his personal representatives under Section 93-2824 R.C.M. 1947 (9086 R.C.M. 1935).

But any such action we concede would be barred under the Federal Employees' Compensation Act, because if the decedent had survived he could have received compensation.

However, the plaintiff and appellant, would have had a cause of action under the law of Montana against a private person for the damages suffered on account of the death of his minor son, so it is submitted that the Compensation Act should not be held to prevent those individuals not covered by it from pursuing other remedies.

In *Gibbs v. United States* (D.C. Cal) 94 F. Supp. 586, the District Court held that the Federal Employees' Compensation Act was not an exclusive remedy for one injured prior to the amendment of October 14, 1949 and that a libelant could proceed under the Public Vessels Act. The decision of the lower court was rendered in 1950 and was affirmed by this court on December 9, 1952 (*Gibbs v. United States* (CCA 9) 200 F. (2d) 197.)

In the District Court Judge Goodman stated:

“The 1949 amendments may be said to have some argumentative weight as indicative of Congressional awareness that up to that time the compensation statute was not the exclusive remedy of employees; or, to say the least, that there was grave doubt in the matter.”

In the Legislative History of the Amendment of October 14, 1949 it is said that the purpose of subdivision (b)

“is to make it clear that the right of compensation benefits under the Act is exclusive *and in place* of any and all other legal liability of the United States.” It is said that “an important gap in the present law will be filled and at the same time needless and expensive litigation *will be replaced* with measured justice” and that “the employees will benefit accordingly under the Compensation Act as liberalized by this bill”.¹²

The right of the father to recover for the death of a minor son in Montana is a right separate and independent from that of the son for his own injuries. It is submitted that the Federal Employees' Compensation Act should not be held to cut off the independent rights of the father who could not receive benefits under the Compensation Act.

It is submitted that it was not the intention of Congress to cut off an existing right of action of one in the position of the plaintiff here. *Hitafter v. Argonne Co.*, 87 App D C 57, 183 F. 2d 811, 23 ALR 2d 1366; cert. denied, 340 U S 852, 95 L ed 624, permits a construction that the Federal Employees' Compensation Act does not bar the action by the Plaintiff.

12. Appendix V

It is respectfully submitted that the judgment of the District Court should be reversed.¹³

WELLINGTON D. RANKIN

ARTHUR P. ACHER

Attorneys for Plaintiff
and Appellant

13. Like appeals are pending in this court, No. 14042, Rene Roch, Appellant, v. United States of America, Appellee, No. 14043, Elliot I. Navon and Sylvia Navon, Appellants, v. United States of America, Appellee No. 14044, N. E. Thompson and Lucy Thompson, Appellants, v. United States of America, Appellee, on behalf of the parents of three other young men who perished in the same disaster. A stipulation is on file in each of the cases that a judgment or order may be made by the Court of Appeals in each of said actions identical to that entered in this case.

APPENDIX

Title 28, USCA, Section 2674 provides:

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

“If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.”

Title 28 USCA, Section 1346, provides in part:

“1346. *United States as defendant*

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Title 5, U.S.C.A. Section 757 as enacted September 7, 1916.

“§757. *Person receiving not to be paid for other services; pensions.* As long as the employee is in receipt of compensation under this chapter, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States. (Sept 7, 1916, c. 458, § 7, 39 Stat. 743.)”

Title 5, U.S.C.A. Section 757 as amended July 1, 1944.

“§757. *Person receiving not to be paid for other services; pensions.* As long as the employee is in receipt of compensation under sections 751-791, 793 of this title, or, if he has been paid a lump sum in commutation of installment payments, until the expiration of the period during which such installment payments would have continued, he shall not receive from the United States any salary, pay, or remuneration whatsoever except in return for services actually performed, and except pensions for service in the Army or Navy of the United States: Provided, That whenever any person is entitled to receive any benefits under sections 751-791 and 793 of this title by reason of his injury, or by reason of the death of an employee, as defined in section 790 of this title, and is also entitled to receive from the United States any payments or benefits (other than the proceeds of any insurance policy), by reason of such injury or death under any other Act of Congress, because of service by him (or in the case of death, by the deceased) as an employee, as so defined, such person shall elect which benefits he shall receive. Such election shall be made within one year after the injury or death, or such further time as the Administrator

may for good cause allow, and when made shall be irrevocable unless otherwise provided by law. As amended July 1, 1944, c. 373, Title VII, ¶ 705 (a), 58 Stat. 712; 1946 Reorg. Plan No. 2, ¶ 3, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; Aug. 13, 1946, c. 958, ¶ 5, 60 Stat. 1049.”

Title 5, U.S.C.A. Section 757, was amended October 14, 1949, by the act cited as the “Federal Employees’ Compensation Act Amendments of 1949”, including the following provisions:

“Sec. 201. Section 7 of the Federal Employees’ Compensation Act, as amended (5 U.S.C., 1946 edition, sec. 757), is further amended by inserting the designation “(a)” immediately before the first sentence thereof and by adding to such section a new subsection reading as follows:

“(b) The liability of the United States or any of its instrumentalities under this Act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen’s compensation law or under any Federal tort liability statute: *Provided, however,* That this subsection shall not apply to a master or a member of the crew of any vessel.’ ”

“Sec. 303. (a) Except as otherwise provided by this section or in this Act, titles I and II of this Act shall take effect on the date of enactment of this Act and be applicable to any injury or death occurring before or after such date.”

“(g) The amendment made by section 201 of this Act to section 7 of the Federal Employees’ Compensation Act, making the remedy and liability under such Act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this Act: *Provided, however,* That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this Act to the contrary, or to discontinue such action notwithstanding any provisions of this Act to the contrary, or to discontinue such action within six months after such date before final judgment and file claim for compensation under the Federal Employees’ Compensation Act, as amended, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after enactment of this Act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees’ Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such Act (including any extension of such time limitations by any provision of this Act), or within one year after final determination of such cause, whichever is later, be entitled to file a claim under such Act.” (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Volume 1, pages 866, 880.)

LEGISLATIVE HISTORY

“TITLE II—Technical Amendments

Section 201: Section 7 of the act would be amended by designating the present language as subsection “(a)” and by adding a new subsection “(b).”

The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill." (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Volume 2, page 2135)

Title 5, U.S.C.A., Section 760, as amended July 28, 1945, provided:

"If death results from the injury the United States shall pay to the following persons for the following periods a monthly compensation equal to the following percentages of the deceased employee's monthly pay:

* * *

"(E) To the parents, if one is wholly dependent for support upon the deceased employee at the time of his death and the other is not dependent to any extent, 25 per centum; if both are wholly dependent, 20 per centum to each; if one is or both are partly dependent, a proportionate amount in the discretion of the commission.

* * *

"(G) The compensation of each beneficiary under clauses (E) and (F) shall be paid from the time of the death, until he, if a parent or grandparent, dies, marries, or ceases to be dependent, or, if a

brother, sister, or grandchild, dies, marries, or reaches the age of eighteen, or, if over eighteen and incapable of self-support, becomes capable of self-support. The compensation of a brother, sister, or grandchild under legal age shall be paid to his or her guardian."

MONTANA STATUTES

(Revised Codes of Montana, 1947)

"93-2809. (9075) *Parent or guardian may sue for injury or death of child or ward.* A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

"93-2810. (9076) *When representative may sue for death of one caused by the wrongful act of another.* When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."